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No. 06-582

Supreme Court, U.S.
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In The

Supreme Court of the United States

THE UNIVERSITY OF NOTRE DAME,

Petitioner,

v.

JOAN LASKOWSKI, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this case is ripe for review by this Court where there has been no final judgment or relief issued in the case, where the Petitioner may ultimately prevail by reason of the subsequent final result in this case, and where any alleged error created by the Seventh Circuit's non-final judgment can be fully rectified by this Court in a later petition for review of the final judgment.

2. Whether the Petitioner has presented compelling reasons to grant the Petition, where the Seventh Circuit's decision that a taxpayer has standing to challenge a Congressional expenditure made under the Tax and Spending Clause is entirely consistent with *Flast v. Cohen*, 392 U.S. 83 (1968), and all other relevant precedent of this Court and does not conflict with any decision of another court of appeals.

3. Whether the Petitioner has presented compelling reasons to grant the Petition, where the Seventh Circuit's unremarkable decision that this cause is not moot because the remedy of restitution is still available is not in conflict with any decision of this Court or any other court of appeals.

PARTIES TO THE PROCEEDING

Petitioner is the University of Notre Dame and Respondents are Joan Laskowski and Daniel M. Cook.

Margaret Spellings, in her official capacity as Secretary of the United States Department of Education, was a Defendant below. However, she has not sought a writ of certiorari in this case.

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INTRODUCTION

The Petitioner, University of Notre Dame ("Notre Dame"), has provided no compelling reason why this Court should grant its Petition for a Writ of Certiorari. There has been no final decision in this case: neither the trial court nor the Seventh Circuit reached the issue of whether a First Amendment violation had occurred. Rather, the court of appeals' decision merely held that, when the government has violated the Establishment Clause in granting federal aid, one possible remedy is that the grantee who has used the federal grant funds for religious purposes can be required to provide restitution by returning the misused grant funds to the government. *See Laskowski v. Spellings*, 443 F.3d 930 (7th Cir. 2006), *rehearing denied*, 456 F.3d 702 (7th Cir. 2006). Thus, the court of appeals held only that it is *possible* that a remedy would be available in this case *if* the plaintiff Indiana taxpayers prevail on the merits of the case on remand. Because there has been no final order in this case, and the case could still be resolved on remand based on issues that the Seventh Circuit has not yet considered, this matter is not ripe for review by this Court.

Moreover, Notre Dame has not cited, and cannot cite, to one case from this Court or any other court that conflicts with the Seventh Circuit's decision. Although Notre Dame argues at length that the court of appeals' decision is in conflict with *Flast v. Cohen*, 392 U.S. 83 (1968), the opposite is true: Judge Posner's majority opinion is in perfect conformity with *Flast* and all other relevant precedent of this Court. In fact, the real issue in this case is not whether there is taxpayer standing, but whether or not the case became moot after its filing for lack of a remedy. The Seventh Circuit's decision reaches the unremarkable conclusion that the case is not moot because, if

the taxpayers prevail on the merits of their Establishment Clause claim on remand, the lower court may order the University of Notre Dame to repay the misused grant funds to the United States Department of Education. This conclusion does not conflict with any decision of this Court or other courts of appeals. There is no basis for this Court to grant a writ of certiorari in this case, and the Petition should be denied.

STATEMENT OF THE CASE

In 1999, Congress earmarked a $500,000 "Fund for the Improvement of Post Secondary Education" ("FIPSE") grant to be given to Notre Dame as a United States Department of Education ("DOE") appropriation for Fiscal Year 2000. *See* Consolidated Appropriations Act of 1999, Pub. L. No. 106-113, §309, 113 Stat. 1501, 1501A-261 to 262. This money was to be used by Notre Dame to replicate at other private universities its "Alliance for Catholic Education" ("ACE") program, a teacher education program that includes an essential religious component to it. The DOE awarded the FIPSE grant to Notre Dame in 2000, and the grant expired on December 31, 2004.

Indiana taxpayers ("Taxpayers")[1] initiated this action in December 2003 as a complaint against the DOE for injunctive and declaratory relief, challenging the FIPSE grant to Notre Dame on the grounds that this direct federal aid violated the Establishment Clause of the First

[1] Although Notre Dame refers to them as "alleged" taxpayers (Pet. at 5), it is undisputed that the respondents are federal taxpayers, as the parties stipulated to this fact.

Amendment to the United States Constitution. Notre Dame subsequently intervened in this cause as a defendant. In November 2004, the plaintiff Taxpayers filed their motion for summary judgment, in which they requested that the DOE be required to recoup any spent grant funds from Notre Dame. In January 2005, the DOE and Notre Dame filed cross-motions for summary judgment, in which they alleged that the FIPSE grant funds had been fully dispersed and spent by December 8, 2004. The district court dismissed the case as moot and denied all pending motions for summary judgment because the FIPSE grant had already expired and the grant funds had already been spent. *See* Pet. App. at 27a-29a.

The Seventh Circuit Court of Appeals vacated the district court decision. Judge Posner's majority opinion held that, although the Taxpayers' claim for injunctive relief was moot, the entire case was not moot because Notre Dame could still be required to restore the grant funds to the U.S. Treasury. *See Laskowski v. Spellings*, 443 F.3d 930 (7th Cir. 2006), *reh'g denied*, 456 F.3d 702 (7th Cir. 2006). Therefore, the case was remanded to the district court for a determination on the merits and, if the Taxpayers prevail on the merits, a determination as to whether Notre Dame has any defense to an order of restitution. *See id.* at 936, 937-39. Judge Sykes dissented. *See id.* at 939-46. Petitions for rehearing and rehearing en banc were denied. *See* 456 F.3d 702.

REASONS FOR DENYING THE PETITION

A. This Case Is Not Ripe for Review by This Court as There Has Been No Final Judgment

Except in extraordinary cases, this Court typically awaits final judgment in the lower courts before exercising its certiorari jurisdiction. *See, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (Court is ordinarily reluctant to exercise its certiorari jurisdiction prior to entry of a final judgment in the lower courts.); *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Am. Constr. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 384 (1893) (noting that this Court should not review non-final lower court orders "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause"). There is good reason for this general rule against review of non-final orders, for "many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." *Am. Constr. Co.* 148 U.S. at 384. Moreover, this Court may always review non-final orders in a later petition for a writ of certiorari, after final judgment has been rendered. *Va. Military Inst.*, 508 U.S. 946 (citing *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)).

In this case, there has been no decision on the merits of the Taxpayers' Establishment Clause claim; thus, there has been no decision that the Taxpayers are entitled to any remedy at all. Rather, the court of appeals simply ruled that this case was dismissed prematurely because the remedy of restitution is possible *if* the Taxpayers ultimately prevail on the merits. *Laskowski*, 443 F.3d at 936. That determination rests on issues that have yet to be

considered. First, the Taxpayers must show on remand that the government has violated the Establishment Clause. As Judge Posner points out, if the district court finds on remand that "the grant was entirely proper because it contained adequate safeguards against the use of the money for religious activities," then the government has not violated the Establishment Clause and this case is at an end, even if Notre Dame used the money for religious purposes.[2] *Id.* at 937. Moreover, even if the Taxpayers prevail on the merits of their Establishment Clause claim, the lower court must still decide whether Notre Dame has any legitimate defense to an order of restitution, such as reasonable reliance to its detriment on an honest belief that it was legally entitled to the grant funds.[3] *Id.* at 938-39.

There are too many potential variables in this case to merit review by this Court at this time. However, *if* the Taxpayers prevail on the merits on remand, and *if* Notre Dame cannot establish a defense to an order of restitution, then this Court can certainly review the issue of the appropriateness of the remedy of restitution at that time.

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[2] Of course, as the court of appeals noted, in such a situation the DOE would still have a claim against Notre Dame and/or its partnering institutions for violating the terms of the grant. *See id.* at 937.

[3] Thus, Notre Dame is incorrect when it claims the Seventh Circuit's decision "significantly alters the dispositive liability question from whether the Government violated the First Amendment to whether the recipient institution can be equitably deemed to have reasonably relied on the statutory grant." Pet. at 20-21; 22-23. Rather, Judge Posner specifically noted that the court on remand must first determine that the *Government* violated the Establishment Clause and, if it so determines, *then* decide whether Notre Dame has a defense to an order of restitution. *See Laskowski*, 443 F.3d at 936.

Cf. Va. Military Inst., 508 U.S. 946; *Hamilton-Brown Shoe Co.*, 240 U.S. at 258.

B. The Decision Below Does Not Conflict with Any Opinion of This Court or a Court of Appeals

Notre Dame's primary, if not sole, reason for granting its Petition is its claim that the decision below is an impermissible expansion of *Flast v. Cohen*, 392 U.S. 83 (1968). This is simply not true. *Flast* holds that taxpayers have standing to bring an Establishment Clause challenge to congressional expenditures under the Taxing and Spending Clause. That is precisely what the plaintiff Taxpayers have done in this case. Yet, despite *Flast*, Notre Dame argues that this case should have been declared moot once the challenged grant was fully spent. In ruling otherwise, however, the Seventh Circuit merely applied the well-settled rule that a case is not moot so long as the alleged constitutional violation is still susceptible to a judicial remedy. *See, e.g.*, *Caldron v. Moore*, 518 U.S. 149, 150 (1996). The decision below that Notre Dame may be required to repay the grant funds if there is an Establishment Clause violation is perfectly consistent with the decisions of this Court, and is not in conflict with any other court of appeals.

1. The Decision Below Is Entirely Consistent with *Flast* and Other Relevant Case Law Regarding Taxpayer Standing in Establishment Clause Cases

This case involves the straightforward application of well-established standing principles to litigation that is still at its preliminary stages. Ever since this Court's

decision in *Flast* forty years ago, it has been clear that taxpayers have standing to complain about a federal expenditure that they allege violates the Establishment Clause. *Flast*, 392 U.S. at 106 ("Such an injury is appropriate for judicial redress, and the taxpayer has established the necessary nexus between his status and the nature of the allegedly unconstitutional action to support his claim of standing to secure judicial review.").[4]

Here, the Taxpayers have challenged a grant made by the DOE pursuant to a specific appropriation in the Omnibus Appropriations Act, Pub. L. No. 106-113 (2000), a statute that is clearly an exercise of congressional taxing and spending power.[5] More specifically, the Taxpayers allege that the specific congressional grant to Notre Dame by the DOE violates the Establishment Clause. Under *Flast* and its progeny, the court of appeals correctly found

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[4] Notre Dame repeatedly cites to cases that discuss general standing principles but do not address the unique standing requirements in a taxpayer Establishment Clause challenge to a government expenditure made under Congress' power to tax and spend. *See, e.g.*, Pet. at 9, 13. These citations are simply not helpful in determining whether standing exists under the limited circumstances addressed in *Flast* and this case.

[5] Thus, *Freedom from Religion Foundation v. Chao*, 433 F.3d 989 (7th Cir. 2006), *reh'g and reh'g en banc denied*, 447 F.3d 988 (7th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3065 (Aug. 1, 2006) (No. 06-157), cited extensively by Notre Dame, is inapplicable to this case. The issue in *Chao* is whether a taxpayer can have standing to bring an Establishment Clause claim when Congress did not specifically earmark money for the challenged program or activity. *See id.* at 990. That is simply not at issue in this case, as it is undisputed that the challenged grant is from a specific appropriation made by Congress pursuant to its power to tax and spend. Thus, even if this Court grants certiorari in *Chao*, there is no reason to do so in this case.

that the Taxpayers have established a logical nexus between their taxpayer status and their claim.

Notre Dame does not attack the Taxpayers' standing to complain about an ongoing expenditure of federal dollars on religious activity, but claims that the court of appeals erred in finding that the Taxpayers have standing to complain about an expenditure of federal dollars on religious activity that was fully spent during the pendency of this litigation.[6] Notre Dame claims that in this latter situation, there is no relief available to the Taxpayers, thus removing taxpayer standing. Of course, in order for standing to exist, there must be a "likelihood that the requested relief will redress the alleged injury," *Valley Forge*, 454 U.S. at 472, which in this case is the expenditure of federal funds for religious purposes. As a matter of common sense, that injury can be remedied either by stopping the expenditure from happening in the first place *or* by ordering that the taxpayer funds be returned to the federal treasury even after the expenditure has occurred.[7]

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[6] It is undisputable that the Taxpayers filed this lawsuit one year before the expiration of the challenged grant. Thus, Notre Dame's repeated references to the "long-ceased expenditures," *see, e.g.*, Pet. at 2, are not accurate.

[7] Notre Dame cites *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), for the proposition that private parties do not have standing to seek to "provide[ ] money to the federal treasury." Pet. at 16. However, neither *Steel Co.* nor any of the other cases cited by Notre Dame for this proposition are Establishment Clause cases. As *Flast* has made clear, the expenditure of federal monies for a religious purpose is injury to taxpayers; therefore, taxpayers *do* have standing to seek to protect the federal treasury, rather than themselves directly, in the limited circumstances of an Establishment Clause claim. *Flast*, 392 U.S. at 106 (to show a redressable injury, a taxpayer need only show that "his tax money is being extracted [from the federal treasury] and spent" in violation of the Establishment Clause). Notre Dame's claim to

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In either case, the injury is redressed because taxpayer money will not have been expended on the religious activity of the grant project.[8] Moreover, that the remedy for the injury is an order to the grantee to return the money, rather than an order to the grantor government to recoup the money, does not affect the Taxpayers' standing.[9] The court of appeals was correct in noting that either order would remedy the injury in this case. *See Laskowski*, 443 F.3d at 935.[10]

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the contrary is merely an attack on the well-established holding of *Flast*.

[8] Part of the evil to be avoided through the Establishment Clause is the public perception of government endorsement of religious activity. *County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989) ("The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief. . . . "); *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) ("What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community."). In this case, if the government money is refunded, the perception of government endorsement of the religious activities of the ACE Replication program will be removed.

[9] Notre Dame alleges at various points that the Taxpayers "concede" that they have no remedy against the government at this point. The Taxpayers have never made any such concession. The Taxpayers continued to note, even in their brief opposing the petitions for rehearing, that the Seventh Circuit erred in holding that the court lacks authority to order the Secretary to seek recoupment of the federal funds as a remedy for her own Establishment Clause violation. *See infra* note 13 and accompanying text.

[10] Thus, Notre Dame is incorrect when it repeatedly alleges that the court of appeals' decision authorizes taxpayer standing based solely on the Taxpayers' financial interest in the Treasury. *See, e.g.*, Pet. at 14-15, 29-30. The Taxpayers' injury in this case, as in *Flast*, is not just the

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Notre Dame also argues that the Taxpayers no longer have a claim adverse to the government (and therefore lack standing) merely because the remedy for the Establishment Clause claim is an order that Notre Dame return the grant funds to the government.[11] However, the Taxpayers most certainly do have a claim antagonistic to the government. The Taxpayers' claim is that the government violated the Establishment Clause by failing to ensure through adequate monitoring that the federal taxpayer money it gave directly to Notre Dame was not used for religious purposes. *See Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973). This claim exists to this day, as the government has still not taken any steps to remedy its violation of the Establishment Clause. Because the government willfully refuses to remedy its own Establishment Clause violation, the Taxpayers have a "case or controversy" against the government.[12] The remedy for that

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expenditure, but government sponsorship of religious activity through the expenditure.

[11] Notre Dame oddly argues at the same time both that 1) the courts cannot order restitution because the DOE does not want the grant money back, and 2) the courts cannot order restitution because the DOE's interests are the same as the Taxpayers'. *See, e.g.*, Pet. at 5-6, 11. However, as to the first point, it is up to the courts, not the DOE, to decide whether the DOE has violated the Establishment Clause and, if so, to order an appropriate remedy. *Davis v. Passman*, 442 U.S. 228, 242 (1979); *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Crowell v. Benson*, 285 U.S. 22, 60 (1932); *cf., Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 69 (1992) ("[I]f a right of action exists to enforce a federal [statute] and Congress is silent on the question of a remedy, a federal court may order any appropriate relief."). As to the second point, the DOE does not have the same interest as the plaintiffs, since the DOE refuses to this date to correct its own Establishment Clause violation.

[12] Notre Dame also claims that there is no live case or controversy between the Taxpayers and the government because the relief sought will not come from the government. *See* Pet. at 11, 18-19. However, this

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controversy at this point is an order that Notre Dame provide restitution to the Taxpayers by returning the money to the government. That the government does not want, and has not sought, the money back is the very fact that creates the controversy between the Taxpayers and the government.

In short, the Seventh Circuit's holding that the Taxpayers have standing under *Flast* is unremarkable and fully consistent with this Court's precedent.[13]

Nor has Notre Dame been able to point to any court of appeals case that conflicts with the Seventh Circuit's decision. None of the cases cited by Notre Dame as allegedly showing a conflict involved Establishment Clause challenges to government financial aid. *See* Pet. at 24. Rather, in each of these cases the plaintiffs challenged a government *practice* as violating the Establishment Clause and the claims had become moot either because the

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claim simply ignores the unique circumstances of a taxpayer Establishment Clause claim challenging government financial aid to a third party. In any such case, the remedy will always be against the third party – either stopping the third party from receiving the funding or, as in this case, requiring the third party to return the funding improperly given. None of the cases cited by Notre Dame involve these unique circumstances, and they are therefore inapplicable.

[13] Notre Dame claims that the court of appeals' decision conflicts not only with *Flast*, but also with *Frothingham v. Mellon*, 262 U.S. 447 (1923), and *Doremus v. Bd. of Educ. Of Borough of Hawthorne*, 342 U.S. 429 (1952). *See* Pet. at 28. However, *Frothingham* did not deal with an Establishment Clause claim, and was specifically distinguished in *Flast* on that ground. *See Flast*, 392 U.S. at 104-05. In addition, the Court held that there was no taxpayer standing in *Doremus* only because there was no showing that taxpayer money actually had been spent on the challenged activity, *see* 342 U.S. at 433, a problem that clearly does not exist in this case. Consolidated Appropriations Act of 1999, Pub. L. No. 106-113, § 309, 113 Stat. 1501, 1501A-261 to 262.

plaintiffs were no longer subject to the practice, *see Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999) (*en banc*); *Adler v. Duval County Sch. Bd.*, 112 F.3d 1475, 1477 (11th Cir. 1997), or because the practice had ceased, *see Chaudhuri v. Tennessee*, 130 F.3d 232, 235 (6th Cir. 1997).[14] The contrast in the present case is clear. As noted above, here the injury is not the religious activity itself, but the *sponsorship* of that religious activity through the expenditure of taxpayer money. Although the religious activity has already happened, the government sponsorship of that religious activity can still be remedied by a return of the taxpayer money to the government. Such a remedy would remove all public perception of government endorsement of religion.[15]

This case presents no conflict with any other court of appeals, and the Petition should be denied.

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[14] Moreover, the controversy in *Chaudhuri* was not even moot, as the plaintiff still had a live damages claim against the school. *See* 130 F.3d at 235.

[15] Nor does this case "exacerbate" the alleged "circuit split" regarding the application of Federal Rule of Civil Procedure 54(c). All of the cases cited at pp. 24-25 of the Petition involved situations where the plaintiffs had failed to request the relief at issue until the appellate stage of the litigation. Although these cases may have been wrongly decided against the plaintiffs, *see, e.g., Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 65-66 (1978), they are nevertheless inapplicable to this case. Here, the Taxpayers clearly requested at the trial court level that the grant money be returned to the government. In that situation, at least, it is clear that the plaintiffs are entitled to the requested relief even if it was not originally pled. *See id.* And, more to the point, under Rule 54(c) of the Federal Rules of Civil Procedure, the Taxpayers would be entitled to any available relief even if they had *never* asked for it. *See, e.g., Holt*, 439 U.S. at 65-66 ("[A] federal court should not dismiss a meritorious constitutional claim because the complaint seeks one remedy rather than another plainly appropriate one.") (citing Rule 54(c)).

2. The Seventh Circuit's Decision That This Case Is Not Moot Because the Common Remedy of Restitution Is Available Is Not in Conflict with Any Decision of This Court or Other Courts of Appeals

The actual holding of the court of appeals was that this case is not moot because the remedy of restitution is available. Thus, the decision stands for the unremarkable proposition that a case is not moot when some meaningful relief is available. *See Caldron v. Moore*, 518 U.S. 149, 150 (1996). Notre Dame has not cited any case that conflicts with this well-established principle.[16] Nor is the court of appeals' decision of such import that it should be reviewed by this Court.

Although the courts can no longer remedy the Establishment Clause violation in this case by an order enjoining the DOE from giving the funds to Notre Dame in the first place, this case is not moot because the remedy of restitution is still available. Of course, an appeal must be dismissed as moot "when, by virtue of an intervening event, a court of appeals cannot grant any effectual relief

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[16] This Court never questioned taxpayers' standing to seek recoupment of government funds given and spent in violation of the Establishment Clause in *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976) and *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*). In both of those cases, the Court merely decided that recoupment was not appropriate as an equitable remedy based on reliance interests developed in each record. *Roemer*, 426 U.S. at 767, n.23; *Lemon II*, 411 U.S. at 194. If anything, those cases demonstrate that the Seventh Circuit's holding is unremarkable and that this Petition is premature. In keeping with those earlier cases, Judge Posner expressly noted that recoupment may be inappropriate based on reliance interests that Notre Dame has yet to assert. That issue can and should be resolved in the first instance by the district court.

whatsoever in favor of the appellant." *Id.* (internal citation omitted). However, even the availability of a partial remedy is sufficient to avoid mootness. *Id.* (citing *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992)). Thus, the court of appeals correctly held that this case is not moot because the lower court can still order Notre Dame to provide restitution by returning the funds, to the extent that those funds were used for religious activity in violation of the Establishment Clause. *See Laskowski*, 443 F.3d at 934.

Restitution or unjust enrichment applies to, among other things, situations in which a person obtains the money or property of others without authority. *See, e.g.*, *P.R. Earling v. John Emigh*, 218 U.S. 27, 35 (1910) ("[A]s the obligation to do justice rests upon all persons, natural and artificial, if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation."). Whether restitution should be ordered here depends on the eventual decision of the trial court. However, the Taxpayers contend that it is warranted because Notre Dame has received the Taxpayers' money pursuant to a grant from the federal government, and Notre Dame has used that money in a manner not contemplated by the grant or permitted under the Establishment Clause; that is, it used the money for religious activity. Thus, Notre Dame has been unjustly enriched by the grant funds.

"A person who has been unjustly enriched at the expense of another is required to make restitution to the

other."[17] RESTATEMENT OF RESTITUTION § 1 (1937); *see also, e.g., Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002) (a plaintiff can "seek restitution in equity. . . . where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession"). And, as the court of appeals points out, a "[d]efendant may be unjustly enriched [even] without having committed any other civil wrong," as when the defendant is enriched by mistake. *Laskowski*, 443 F.3d at 935; *see also, e.g., United States v. Mead*, 426 F.2d 118, 125 (9th Cir. 1970) (Due solely to their unjust enrichment, student applicants for government aid could be liable in restitution for overpayments made to them by mistake and through no fault of their own, where they were aware that applicable regulations governed their aid.). Thus, even if Notre Dame committed no civil wrong because it cannot itself, as a private actor, violate the Establishment Clause, it can nevertheless, because of the unjust enrichment, be required to return the taxpayer money it used for religious activity.[18]

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[17] As the court of appeals noted, "[r]estitution is a standard remedy and one ordered in public-law as well as private-law cases." *Lakowski*, 443 F.3d at 934; *see also, e.g., Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) (Government could enforce compliance with the Emergency Price Control Act by seeking an order that landlords who violated the Act provide restitution of rents to their tenants.).

[18] Moreover, even if Notre Dame cannot violate the Establishment Clause, it certainly is not an "innocent" party who committed no wrong whatsoever in this case. Rather, Notre Dame provided federal grant money to its partnering institutions along with a Statement of Work, which specifically noted that various religious activities were "essential" to the partners' programs, but then utterly failed to monitor the partners to ensure the federal grant money was not used for the essential religious components of each program. Of course, Notre Dame was and is fully

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Of course, in the typical restitution scenario, the unjustly enriched defendant must return the money to the plaintiff directly. However, this case involves an Establishment Clause claim brought by a taxpayer. In such cases, the taxpayer plaintiff will *never* be the one who receives a direct monetary benefit from his successful claim. *See, e.g., Nyquist, supra* (taxpayers who successfully challenged direct federal financial aid to non-public schools sought ruling that the aid was unconstitutional, not an order that the taxpayers themselves directly receive any money or other benefit); *Flast, supra* (federal taxpayers sought order preventing government from funding the purchase of textbooks for parochial schools, not an order that the taxpayers receive money directly). Thus, the fact that the order of restitution in this case would require Notre Dame to give the money back to the federal government rather than to the Taxpayers directly is simply an outgrowth of the fact that Establishment Clause claims challenging government expenditures are necessarily brought by taxpayers whose remedy is never a direct cash benefit but only protection of the federal treasury from the loss of the taxpayer money. Therefore, if a taxpayer successfully challenges a grant before it is given, the federal money remains with the federal government, not the taxpayer. If the taxpayer successfully challenges the grant after it is given, the money is returned to the federal government, not to the taxpayer. In either case, the taxpayer's injury is redressed.

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aware that both the terms of the grant and the First Amendment prohibit use of the grant funds for religion. Thus, Notre Dame's unjust enrichment is not just the government's fault, as Notre Dame seems to claim, but its own as well. The remedy of restitution is certainly just and equitable in this case.

Notre Dame makes a dire prediction that the *Laskowski* decision will have a "chilling effect" on potential religious grantees' willingness to seek federal funds. *See, e.g.*, Pet. at 25. However, no religious institution that plans to use government money in a lawful manner need fear an order of restitution of those funds. As the court of appeals points out, one of the defenses to a claim of restitution is that the grantee relied to its detriment upon a grant wrongfully given *and* "was merely an innocent conduit, neither knowing nor having reason to know that it was receiving an unlawful grant." *Laskowski*, 443 F.3d at 936. In such a situation, the grantee "would not have to make restitution." *Id.*; *see also, e.g.*, RESTATEMENT OF RESTITUTION, § 69.

In sum, the Seventh Circuit correctly held that there is no reason why the standard relief of restitution should not be possible in this case, *see Laskowski*, 433 F.3d at 934, and Notre Dame has cited no case that conflicts with this decision.

CONCLUSION

There is no final order in this case. There has been no finding on the merits of the Establishment Clause claim, and thus no order that Notre Dame provide restitution of the grant funds or provide any other relief. The lower court merely held that this case is not moot because there is still a remedy available should the Taxpayers ultimately prevail on the merits. This holding will become irrelevant if the Taxpayers do not prevail on their Establishment Clause claim. Moreover, there is nothing remarkable about the court's holding that a case is not moot when there is at least some

relief still available, nor is it in conflict with any decision of this Court or other courts of appeals. There is no reason for this Court to grant the Petition, and it should be denied.

Respectfully submitted,

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